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## **VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re:   *Ex Parte* Communication regarding WC Docket No. 03-45 and CC Docket  
      No. 01-92**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission Rules, Level 3 Communications, LLC ("Level 3") respectfully submits the following *ex parte* comments in the above-referenced dockets concerning the pulver.com Petition for Declaratory Ruling and the intercarrier compensation proceeding. This letter is being filed electronically with the Secretary in the above-referenced proceedings.

As described in its petition, pulver.com's Free World Dialup ("FWD") service only allows communications between FWD members who are online when a call is made and currently does not provide members with access to the public switched telephone network ("PSTN") or to cellular networks. FWD requires customers to use their pre-existing broadband connection, provided by parties other than pulver.com, and specialized equipment. FWD service assigns a "FWD number" rather than North American Numbering Plan Numbers to its subscribers. Moreover, FWD users can access the service through the broadband connection of any service provider. As such, the service is inherently portable because users can both place and receive calls from wherever they are able to access a broadband Internet connection.<sup>1</sup>

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<sup>1</sup> See Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service, WC 03-45 at 4 (filed Feb 5, 2003).

The Commission has found that the jurisdictional nature of ISP-bound traffic should be determined, consistent with Commission precedent, by the end points of the communication.<sup>2</sup> Applying this “end-to-end” analysis, the Commission concluded that Internet communications originate with the ISP’s end-user customer and continue beyond the local ISP server to websites or other servers and routers that are often located outside of the state.<sup>3</sup> Accordingly, the Commission found that ISP-bound traffic is jurisdictionally mixed and largely interstate.<sup>4</sup> Likewise, when the Commission granted GTE’s request to tariff the DSL Internet transport service sold to ISPs, the Commission found that the DSL transport service used to provide Internet access is interstate telecommunications.<sup>5</sup> The Commission acknowledged that some of the transmissions passing over an Internet access line may be intrastate in nature, but that the interstate component was not *de minimis*.<sup>6</sup>

The Commission should find that the FWD traffic, as detailed in the pulver.com petition is properly characterized as an interstate service offering due to the impossibility of separating out intrastate and interstate use of the service. While it is possible to use the pulver.com service to complete an intrastate communication, there is no means of separating out the intrastate and interstate communications. As Verizon Communications’ Director of Technology Policy recently observed: “[i]t’s hard to determine jurisdictionally where that [Internet protocol] end point is . . . you don’t know if it’s next door, across the state or around the world.”<sup>7</sup> Because FWD uses unique FWD “numbers” to identify its customers, the same holds true for determining the end points of a FWD communication. Similarly, as discussed above, the portability of FWD service also makes it difficult if not impossible to determine the end points of a FWD user’s communication. Even if their FWD “number” was initially linked to a specific geographic location, because of the portability of the service, it is impossible to tell for any particular call whether it indeed originated from that location. Due to the impossibility of distinguishing interstate and intrastate services, there is no means for tracking revenue on a jurisdictional basis or to comply with regulations that are applicable based on the jurisdictional nature of the FWD service offering.

This Commission has preempted State regulation where, as a practical matter, it is impossible to separate a jurisdictionally mixed service into interstate and intrastate components.<sup>8</sup> For example, the Commission has asserted jurisdiction over dedicated private lines carrying

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<sup>2</sup> *Declaratory Ruling*, 14 FCC Rcd at 3695-3701; *see also* Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992) (subsequent history omitted).

<sup>3</sup> *Declaratory Ruling*, 14 FCC Rcd at 3695-97.

<sup>4</sup> *Declaratory Ruling*, 14 FCC Rcd at 3690, 3695-03.

<sup>5</sup> *See GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, 13 FCC Rcd. 22466 (1998) (“*GTE DSL Order*”).

<sup>6</sup> *GTE DSL Order*, ¶¶ 22, 25.

<sup>7</sup> *See* Glenn Bischoff and Vince Vittore, “States Push to Regulate Voice”, *Telephony* at 9 (Sept. 22, 2003)

<sup>8</sup> *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22983, ¶ 107 (2000) (“[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission’s authority”); *Rules and Policies Regarding Calling Number Identification Service -- Caller ID*, 10 FCC Rcd. 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable).

jurisdictionally mixed traffic (except where the interstate use is *de minimis*), because of the practical impossibility of measuring and billing separately for the portion of the line carrying intrastate traffic.<sup>9</sup> Because FWD is jurisdictionally interstate and it is impossible to accurately separate out any intrastate portion, the Commission should also preempt state regulation of FWD.<sup>10</sup>

Level 3 also notes that while the FWD service as described in the petition does not currently complete calls to the PSTN, FWD may evolve into a service that allows for such connections. Should FWD be used to complete calls to the PSTN, the Commission should remain consistent with its existing precedent and find that such traffic is a jurisdictionally interstate information service that may use local services to originate or terminate traffic on the PSTN. As a necessary corollary, when two LECs exchange such information service traffic, it should be subject to local intercarrier compensation rates.

In 1983, the Commission found that enhanced service providers (“ESPs”) could be end user customers, rather than providers of telecommunications services.<sup>11</sup> Since 1983, the Commission has exempted ESPs from the payment of certain interstate access charges.<sup>12</sup> As a result of the “ESP exemption,” providers of enhanced services pay local business service rates to connect to the PSTN.<sup>13</sup> Thus, despite the Commission’s understanding that ISPs use *interstate* access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under *local* tariffs. In short, the ESP exemption inherently recognizes that a communication can be jurisdictionally interstate but subject to local compensation between carriers. The same should be true for FWD if it offers PSTN connectivity in the future.

In looking forward to developing a unified intercarrier compensation regime, the Commission must be careful to avoid creating competitive distortions and ensure that providers make deployment decisions based on economics and customer demand rather than out of regulatory fear and uncertainty. Level 3 urges the Commission to continue its access charge exemption for VoIP applications such as FWD until it is able to adopt prospective regulations

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<sup>9</sup> *MTS and WATS Market Structure*, 4 FCC Rcd. 5660, 5660-61, ¶¶ 6-9 & n.7 (1989) (“*MTS Order*”); see also *Petition of New York Telephone Company*, 5 FCC Rcd. 1080 (1990).

<sup>10</sup> Further, as the U.S. District Court for the District of Minnesota found in its *Vonage* decision, states may not impose common carrier regulation on information services because the Federal statutory scheme necessarily preempts State regulation of information services. See generally *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, Civil No. 03-5287(MJD/JGL), slip op. (D. Minn. Oct. 16, 2003). Importantly, in finding that Vonage is an information service provider, the Court agreed with the FCC that Congress has expressed its desire that information services—such as those VoIP services provided by pulver.com—must not be regulated by state law, which would decimate Congress’ mandate that the Internet remain unfettered by regulation. See *id.* at 18. This same rationale would apply to finding that states may not impose common carrier regulation on the FWD service.

<sup>11</sup> *MTS/WATS Market Structure Order*, 97 FCC 2d 711, 715 (1983).

<sup>12</sup> This policy is known as the “ESP exemption.” See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); see also Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (“*ESP Exemption Order*”) (“the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired”); *Access Charge Reform Order*, 12 FCC Rcd at 16133 (“[m]aintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry”).

<sup>13</sup> *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53.

governing the appropriate compensation regime for the exchange of all traffic. Under the existing irrational system, the same PSTN network function is treated at least five different ways for jurisdictional and compensation purposes. In her statement accompanying the Commission's Notice of Proposed Rulemaking regarding a unified intercarrier compensation regime, Commissioner Ness noted that the exact same network function can have multiple prices – and even differing directions of payment – depending upon whether the call is local, long distance, Internet-bound, CMRS or paging.<sup>14</sup> Add to this the complexities of intraLATA toll and interLATA toll, and interstate and intrastate splitting of traffic, and it becomes all too clear that Commissioner Ness was on the mark in stating that “[i]n an era of convergence of markets and technologies, this patchwork of regimes no longer makes sense. What had been a historical artifact may have become an unsustainable anomaly.”<sup>15</sup> Level 3 submits that the nascent emergence of VoIP is the catalyst that finally makes clear that the historical patchwork of intercarrier compensation regimes has in fact become an unsustainable anomaly.

Level 3 has always advocated moving the intercarrier compensation regime to a forward-looking, cost-based model so that carriers are appropriately compensated for the functionality provided with a reasonable profit. By requesting the Commission to continue the access charge exemption for VoIP traffic such as FWD's service, and affirming that the ESP exemption results in local compensation as between LECs that provide service to ESPs under the ESP exemption, Level 3 is not asking the Commission to ignore the need for comprehensive compensation reform. Instead, Level 3 is asking the Commission to move the industry one step closer to the unified, cost-based intercarrier compensation regime that is the Commission's ultimate goal.

Respectfully submitted,

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<sup>14</sup> See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. April 27, 2001), Separate Statement of Commissioner Ness.

<sup>15</sup> *Id.*